IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re OAKWOOD MARKETS, INC., Debtor.	No. 96-20444 Chapter 7
MAURICE K. GUINN, TRUSTEE, Plaintiff, *vs*. MacLEAN, INC., Defendant.	Adv. Pro. No. 98-2056

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the chapter 7 trustee seeks the avoidance and recovery pursuant to 11 U.S.C. §§ 547 and 550 of four prepetition rental payments made by the debtor to MacLean, Inc. ("MacLean"). MacLean has moved for summary judgment, asserting that the trustee cannot establish that the transfers were "on account of an antecedent debt" as required by 11 U.S.C. § 547(b)(2) or alternatively that the affirmative defenses of contemporaneous exchange and ordinary course of business respectively provided by 11 U.S.C. § 547(c)(1) and (2) except the transfers from avoidance and recovery. The court concludes that all the transfers were on account of antecedent debts. Because MacLean has failed to establish all the elements of the affirmative defenses of contemporaneous exchange and ordinary course of business, the motion for summary judgment will be denied. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(F).

I.

Prior to the commencement of this case, the debtor owned and operated six retail grocery stores located in northeast Tennessee and southwest Virginia. One such store was in the Colonial Heights area of Sullivan County, Tennessee on premises leased to the debtor by MacLean. Under the terms of the

parties' lease agreement executed on August 3, 1966, the debtor was obligated to pay rent of $750.00 per month (the "base rental") plus 1% of the store's gross sales exceeding $750,000.00 in any fiscal year (defined as being from November 1 though October 31) during the term of the lease (the "formula rental"). The base rental of $750.00 was due in advance on the first day of the month and the formula rental was due "within three (3) months after the end of each respective fiscal year."

On October 26, 1995, in anticipation of the expiration of the lease on November 29, 1995, MacLean and the debtor agreed to a six-month lease extension beginning November 29, 1995, and ending May 28, 1996. In connection with the extension, the base and formula rentals were replaced with a single $5,000.00 monthly payment "commencing on November 29, 1995, and on the 29th day of each calender month thereafter up through and including April 29, 1996." Pursuant to this agreement, the debtor paid MacLean the sum of $5,000.00 on December 18, 1995, for the December rent and an additional $5,000.00 sum on January 11, 1996, for the January 1996 rent.

In the meantime, in December 1995 Fleming Companies, Inc. ("Fleming"), the debtor's principal creditor and majority supplier of its inventory and equipment, declared the debtor in default under the terms of the parties' loan agreements, placed

the debtor on C.O.D. basis for the purchase of inventory, and filed suit in state court for the appointment of a receiver to operate the debtor's business. On February 1, 1996, the debtor and Fleming entered into an agreement wherein the debtor agreed, *inter alia*, to a foreclosure sale by Fleming under the Uniform Commercial Code and the appointment of a receiver to operate the debtor's stores pending the sale. A state court receiver was appointed on February 8, 1996, and a bulk sale of the debtor's assets was noticed by Fleming for March 7, 1996.

After the appointment of the receiver, the debtor's lease with MacLean was modified once again. By letter dated February 20, 1996, MacLean and the receiver agreed that the monthly rental payments would be reduced from $5,000.00 to $2,500.00 commencing with the March 1996 rent which would be due February 29, 1996. MacLean also agreed to execute a consent to assignment and assumption of the lease in connection with the scheduled foreclosure sale "upon receipt of the sum of $21,651.00, which represents February rent and the one percent on gross sales in excess of $750,000.00 for the 1995 fiscal year of Oakwood." Pursuant to this agreement, an agreed order was entered in the state court receivership matter on February 21, 1996, authorizing the receiver to deliver to MacLean "$16,651 representing the 1% on gross sales in excess of $750,000 in the

1995 fiscal year" and "$5000 representing February's rent." Checks in these amounts were delivered from the receiver to MacLean on February 21, 1996, and MacLean executed the assignment consent form.

On March 6, 1996, three unsecured creditors of the debtor filed an involuntary chapter 11 petition against the debtor. Upon agreement of the debtor, the petitioning creditors and Fleming, this court allowed the foreclosure sale scheduled for March 7 to go forward. The court directed the sale proceeds to be paid into the registry of the court pending further orders unless Fleming was the successful bidder, in which event Fleming would pay into the court registry only the proceeds of sale which exceeded the debtor's indebtedness to Fleming.

The foreclosure sale was held as scheduled, with Fleming being the successful bidder. Fleming filed a report of sale on April 12, 1996, and paid into the court registry excess sale proceeds of $15,198.00. Because the debtor did not controvert the involuntary chapter 11 petition filed against it, an order for relief under chapter 11 was entered in the bankruptcy case on April 2, 1996. Upon motion by the petitioning creditors, the case was subsequently converted to chapter 7 by order entered April 18, 1996.

In the present adversary proceeding commenced April 1, 1998,

the chapter 7 trustee seeks to avoid and recover as preferential transfers the three monthly rental payments of $5,000.00 each paid December 18, 1995, January 11, 1996, and February 21, 1996, and the annual formula rental payment of $16,651.00 paid February 21, 1996. MacLean's pending motion for summary judgment pursuant to Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, is supported by a brief and the affidavit of its vice-president, Jeffrey H. Benedict. The trustee's response to the motion is supported by his personal affidavit which references attached copies of the four checks at issue herein.

II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. *See Schilling v. Jackson Oil Co. (In re Transport Assoc., Inc.),* 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994)(citing *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986)). *See also Street v. J.C. Bradford & Co.,* 886 F.2d 1472 (6th Cir. 1989). "[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but ... by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). *See Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

III.

11 U.S.C. § 547(b) provides as follows:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made—
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if—
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and

> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The burden of proving the avoidability of a transfer under § 547(b) lies with the trustee while the burden of proving the applicability of an exception to a preference under § 547(c) is on the defendant. *See* 11 U.S.C. § 547(g) and *Logan v. Basic Distrib. Corp. (In re Fred Hawes Org., Inc.)*, 957 F.2d 239, 242 (6th Cir. 1992).

MacLean's motion for summary judgment is based on the trustee's alleged inability to establish paragraph (2) of § 547(b), that the transfers were for or on account of an antecedent debt owed by the debtor before such transfers were made. MacLean contends that the rent payments in question were not on account of antecedent debts because the debt on a lease obligation is incurred when each monthly installment is due, rather than when the lease obligation was originally executed.[1]

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[1]*See Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986)("We hold that the debts were incurred under the lease in monthly increments on the actual dates the rent was due."); *Child World, Inc. v. Service Merchandise Co., Inc. (In re Child World, Inc.)*, 173 B.R. 473, 476 (Bankr. S.D.N.Y. 1994)("[I]t is well settled that the obligation to pay rent is deemed to arise on the due dates provided in the lease and not when the lease is signed."); *Sapir v. Eli Haddad Corp. (In re Coco),* 67 B.R. 365, 370 (Bankr. S.D.N.Y. 1986)("Lease payment obligations arise when they become due and payable because of the lessee's possession, not when the

(continued...)

Thus, under the terms of the parties' lease agreement, as amended, the December 1995 rent became due November 29, 1995, the January 1996 rent became due on December 29, 1995, and the February 1996 rent became due on January 29, 1996. Similarly, the formula rental payment for 1995, which under the terms of the agreement was to be paid within three months after the end of the fiscal year, became due on February 1, 1996,[2] three months after the 1995 fiscal year ended on October 31, 1995. The trustee does not dispute these are the dates that the debts were incurred but asserts that because the rent payments were each made several days after these dates, the transfers were "for or on account of an antecedent debt."

The trustee is correct. "An antecedent debt is a debt that is incurred prior to the relevant transfer." *S. Technical College v. Graham (In re S. Technical College),* 199 B.R. 46, 49 (Bankr. E.D. Ark. 1995), *aff'd S. Technical College v. Hood*, 89

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[1](...continued)
lease is signed.") and *Carmack v. Zell (In re Mindy's Inc.)*, 17 B.R. 177, 179 (Bankr. S.D. Ohio 1982) ("Historically, the payment of current rent has been held to rest upon current consideration and thus did not constitute a preference under previous bankruptcy law.").

[2]By the court's calculation, three months after October 31, 1995, is January 31, 1996, rather than February 1, 1996. However, the affidavit of Mr. Benedict recites that the formula rental was due February 1 and this date is accepted by the trustee in his brief.

F.3d 1381 (8th Cir. 1996). *See also Matter of Cavalier Homes of Ga., Inc.,* 102 B.R. 878, 887 (Bankr. M.D. Ga. 1989)(antecedent debt means debt that was owed before the transfer was made) and *Fonda Group, Inc. v. Marcus Travel (In re Fonda Group, Inc.),* 108 B.R. 956, 959 (Bankr. N.D. Ohio 1989)("[A] debt is 'antecedent' when the debtor becomes legally bound to pay before the transfer is made."). It is undisputed that all of the rent payments in question were remitted to MacLean after their respective due dates. The December 1995 rent payment which was due November 29, 1995, was not paid until December 18, 1995.[3] The January 1996 rent payment, which was due December 29, 1995, was not paid until January 11, 1996, and February rent due January 29, 1996, was paid 23 days later on February 21, 1996. Similarly, the annual formula rent payment due February 1, 1996, was paid February 21, 1996. Because each rent payment was made sometime after the debtor became legally obligated to pay, each payment was on account of an antecedent debt. Accordingly, the defendant's assertion that the trustee will be unable to establish the antecedent debt element of a preference set forth

[3]The payment dates are as alleged in the complaint and admitted in the defendant's answer. From the copies of the checks attached to the trustee's affidavit, it appears that these dates are those on which the checks were honored by the bank rather than the dates the payments were delivered by the debtor to the defendant.

in § 547(b)(2) is without merit.[4] *See In re Coco*, 67 B.R. at 370 ("Here the payments at issue were all tardily made (6, 7, 34 and 64 days after the first of the month for which the rent was due)

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[4]MacLean also advances the argument that the late rental payments were not on account of antecedent debts because late payments were the ordinary course of business. In support of this assertion, MacLean cites the cases of *In re White River Corp.* and *In re Mindy's, Inc.*, wherein the courts, according to MacLean, "found that the late payment of rent was not 'on account of an antecedent debt' if the late payment were made in the ordinary course of business." However, neither of these cases contain this statement nor support this proposition. The antecedent nature of the debt was not even at issue in *White River* and there was no discussion of the subject. In fact, the defendant in *White River* had admitted that the transfers in question were preferential, *see In re White River Corp*, 799 F.2d at 632; which would by definition concede the debts' antecedency. Although the defendant in *Mindy's* did argue that the lease payments were not on account of an antecedent debt and that the ordinary course of business exception applied, the court did not discuss the antecedent debt issue *per se*. The *Mindy's* court did conclude that because the monthly rent payments were made in the ordinary course of business within 45 days after each obligation became due on the first day of each month, the payments could not be recovered by the trustee as preferential. *In re Mindy's, Inc.*, 17 B.R. at 179-180. To the extent that this holding could be read, as MacLean argues, as support for the proposition that a debt is rendered nonantecedent if the ordinary course of business exception is applicable, this court must respectfully disagree. Exceptions under § 547(c) only come into play if all of the elements of a preference are met under § 547(b). The conclusion that a transfer falls within one of the subsection (c) exceptions does not nullify any of the elements of a preference under subsection (b). Instead, the § 547(c) exceptions insulate a transfer from avoidance notwithstanding its preferential nature. *See* 1 DAVID G. EPSTEIN, STEVE H. NICKLES AND JAMES J. WHITE, BANKRUPTCY § 6-22 (1992)("A transfer that is a preference under section 547(b) is nevertheless safe from avoidance by the trustee to the extent the transfer fits within one or more of the exceptions described in section 547(c).").

and thus were technically on account of antecedent indebtedness.").

The court turns next to the defendant's contention that the rent payments in question are protected from avoidance by the contemporaneous exchange exception of § 547(c)(1) of the Bankruptcy Code. This subsection provides that:

> The trustee may not avoid under this section a transfer ... to the extent such transfer was—
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
> (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c)(1). In order for MacLean to prevail under this exception, it must establish that (1) new value was given to the debtor in exchange for each payment; (2) the parties intended each exchange to be contemporaneous; and (3) each exchange was in fact substantially contemporaneous. *See Everlock Fastening Sys., Inc. v. Health Alliance Plan (In re Everlock Fastening Sys., Inc.)*, 171 B.R. 251, 254 (Bankr. E.D. Mich. 1994).

MacLean contends that the new value given by it in exchange for each rental payment was "the right and opportunity to occupy the property" and MacLean's execution of a "'Consent to Assignment and Assumption of Lease' that facilitated the liquidation of Oakwood as a going concern and resulted in

$13,000.00[5] being returned to the estate." The trustee asserts in response that no new value was given in exchange for any of the rental payments because the debtor had already received value at the time of each $5,000.00 payment through its occupancy of the leased premises, citing *In re Coco*, 67 B.R. at 371 (no new value exchanged where month for which rent paid had ended). The trustee also asserts that MacLean has failed to establish the second and third elements of the exception: that the parties intended each exchange to be contemporaneous and each exchange was in fact substantially contemporaneous. According to the trustee, there is no evidence in the record that the debtor intended the exchanges to be contemporaneous. And the exchanges were not substantially contemporaneous in fact, the trustee argues, because the span of the contemporaneous exchange exception is limited to ten days at most, and none of the payments were made within ten days of their due date.

The reported cases support MacLean's contention that the right to occupy lease premises is new value given by a landlord in exchange for monthly lease payments. *See S. Technical College v. Hood*, 89 F.3d at 1385 (continued use of leased

[5]The court assumes that MacLean is referring to the $15,198.00 which Fleming paid into the court registry as excess sale proceeds from the March 7 foreclosure sale.

property can constitute new value for § 547(c)(4) purposes); *In re S. Technical College*, 199 B.R. at 49 (use of leased property is new value as that term is used in both § 547(c)(1) and (4)); *In re Child World, Inc.*, 173 B.R. at 478 (checks for rent qualified as contemporaneous exchange of new value under § 547(c)(1))(dicta); *In re Coco*, 67 B.R. at 370-371 (new value for § 547(c)(1) purposes is debtor's right to occupancy for current month); *Armstrong v. General Growth Dev. Corp. (In re Clothes, Inc.),* 35 B.R. 489, 492 (Bankr. D.N.D. 1983)(finding monthly rental payments to be contemporaneous exchanges) and *In re Mindy's, Inc.*, 17 B.R. at 180 (finding could bring rental payments under the protection of § 547(c)(1))(dicta).

In the contemporaneous exchange context, the new value given ***in exchange*** for the payment is the right to occupy the premises for the current month. *See, e.g., In re Coco*, 67 B.R. at 371 ("The new value which is the grounding for our conclusion is the debtor's right to occupancy for that month.") and *Ross v. Philadelphia Hous. Auth. (In re Ross)*, 1997 WL 331830 at *3 (Bankr. E.D. Pa. June 10, 1997)(contemporaneous exchange exception not applicable because rent payments were for back rent rather than current rent). Thus, the new value given by MacLean in exchange for payment of the December rent on December

18, 1995, was the right to occupy the premises in December; the new value given by MacLean in exchange for payment of the January rent on January 11, 1996, was the right to occupy the leased premises in January; and the new value given by MacLean in exchange for payment of the February rent on February 21, 1996, was the right and opportunity to occupy the premises in February. Accordingly, the first requirement of § 547(c)(1), that new value be given in exchange for each transfer, has been established with respect to the three $5,000.00 payments.

Notwithstanding this conclusion, there is no evidence before the court as to the worth of the new value given by MacLean, *i.e.*, that each month's rental of the lease premises was worth $5,000.00 at the time the transfers occurred. MacLean argues that such proof is unnecessary and cites *Kenan v. Ft. Worth Pipe Co. (In re George Rodman, Inc.)*, 792 F.2d 125 (10th Cir. 1986), for the proposition that there is no *quid pro quo* requirement, only that value of some amount be given. This court respectfully disagrees with *Rodman*. As the district court stated in *Miller v. Bodek & Rhodes, Inc. (In re Adelphia Automatic Sprinkler Co.),* 184 B.R. 224 (E.D. Pa. 1995):

> Section 547(c)(1) protects transfers only up to the extent that the transfer was a contemporaneous exchange for new value. *In re Jet Florida Sys., Inc.*, 861 F.2d at 1559. "[A] party seeking the shelter of section 547(c)(1) must [therefore] prove the specific

> measure of the new value given the debtor in the exchange transaction he seeks to protect." *In re Spada*, 903 F.2d at 976 (quoting *In re Jet Florida Sys., Inc.*, 861 F.2d at 1558); *see also In re Nucorp Energy, Inc.*, 902 F.2d 729, 733 (9th Cir. 1990); *In re Robinson Bros. Drilling, Inc.*, 877 F.2d 32, 34 (10th Cir. 1989)(per curiam). "The purpose of this rule is to ensure that the debtor receives at least as much in new value as it transfers away." *In re C.P.P. Export & Import, Inc.*, 132 B.R. 962, 965-66 (D. Kan. 1991). New value does not consist of "esoteric or intangible benefits" but instead "must actually and in real terms enhance the worth of the debtor's estate so as to offset the reduction in the estate that the transfer caused." *In re Aero-Fastener, Inc.*, 177 B.R. 120, 138 (Bankr. D. Mass. 1994).

Id. at 228. *See also In re Finelli Jewelry Co.*, 79 B.R. 521, 522 (Bankr. D.R.I. 1987)("The value given in a contemporaneous exchange must approximate the worth of the asset transferred to qualify as an exception to the preference provisions.") and 1 DAVID G. EPSTEIN, STEVE H. NICKLES AND JAMES J. WHITE, BANKRUPTCY § 6-25 (1992)(critical of *Rodman* and explaining why better rule is that (c)(1) applies *pro tanto*).

With respect to the other requirements of the contemporaneous exchange exception, that the parties intend each exchange to be contemporaneous and each exchange was in fact substantially contemporaneous, the reported cases, for the most part, hold that an exchange of leased space for rent payments is substantially contemporaneous so long as payment is made during the month the space is provided. *See In re Child World, Inc.*,

173 B.R. at 478 (checks honored on Feb. 6 and 13 for February rent qualify as contemporaneous exchanges for value); *In re Coco*, 67 B.R. at 371 (payments made on June 7 for June rent and July 6 for July rent were substantially contemporaneous) and *In re Clothes, Inc.,* 35 B.R. at 492 (payments of October rent on Oct. 15 and November rent on Nov. 6 were contemporaneous exchanges). *But see In re Ross*, 1997 WL 331830 at *3 (rent payments made in the middle rather than at the beginning of the month do not fit within the substantially contemporaneous requirement of § 547(c)(1)) and *In re Mindy's, Inc.,* 17 B.R. at 180 (monthly rental payments from 20 to 60 days late fell within exception where lease payments were based on a percentage of monthly gross sales and such amounts were not determinable until 10 days after close of month). *See also In re Everlock Fastening Sys., Inc*., 171 B.R. at 256 (payment on 19th day of the month for health care services provided during the same month was substantially contemporaneous). This court agrees and concludes that because the three $5,000.00 monthly rent payments were each made during the month for which services were provided, the exchanges were substantially contemporaneous. Furthermore, the court concludes that the parties intended the exchange of each $5,000.00 rental payment to be contemporaneous with the provision of the leased premises since there is no

dispute that each of these payments were made for the current month rather than for any past due arrearage.

The trustee's argument that payment must have taken place within ten days of its due date in order to be substantially contemporaneous is without merit. The Bankruptcy Code does not define "contemporaneous" and provides no such ten-day window. The cases cited by the trustee in support of the alleged ten-day rule deal exclusively with the issue in the context of the perfection of security interests. *See Ray v. Sec. Mut. Finance Corp. (In re Arnett)*, 731 F.2d 358, 363-364 (6th Cir. 1984)("The applicability of section 547(c)(1) to delayed perfection of security interests is ... limited to 10 days.") and *Hildebrand v. Resource Bancshares Mortgage Group (In re Cohee)*, 178 B.R. 154, 157 (Bankr. M.D. Tenn. 1995)(citing *In re Arnett*). Outside this context, "the courts have established no set lengths of time for the gap between the giving of value and the transfer of the debtor's property that clearly mark an exchange as contemporaneous or not contemporaneous. The issue of contemporaneity is a fact-bound inquiry that turns on the peculiar facts and circumstances of each case." 1 DAVID G. EPSTEIN, STEVE H. NICKLES AND JAMES J. WHITE, BANKRUPTCY § 6-27 (1992).

Before turning to the ordinary course of business exception raised by MacLean, the court must address whether the formula

rental payment of $16,651.00 is protected by the contemporaneous exchange exception. Clearly no new value in the form of lease space was given in exchange for the payment since the payment was the annual rental for the previous year. MacLean asserts that the new value given the debtor in exchange for this payment was its execution of the assignment consent form and the sum eventually received by the bankruptcy estate from the foreclosure sale. With respect to execution of the form, it does appear that this was new value given in exchange for the payment, that the parties intended the exchange to be contemporaneous, and the exchange was in fact contemporaneous. MacLean conditioned its execution of the form upon receipt of the annual payment and the exchange was substantially contemporaneous: the consent was executed on February 20 and payment was made on February 21. Evidence is lacking, however, as to the economic value of this consent. Thus, summary judgment is inappropriate. While of course this is a question of proof which awaits trial, the court would not anticipate that the consent to the assignment would have much value since the lease was due to expire on May 28, 1996, less than three months after the scheduled foreclosure sale, and there were no extension options. Furthermore, the lease agreement indicated that MacLean intended to construct new buildings on the real

property where the debtor's store was located. As a result, the lease gave MacLean the right to terminate the lease at its option if substantial repairs were required or if demolition of the store became necessary because of the new construction. These lease provisions would of course greatly diminish the value of any lease assignment.

With respect to the alleged new value in the form of monies paid into the estate by Fleming, the evidence before the court does not establish that this new value was given ***in exchange*** for payment of the annual rent, nor the other two requirements for the exception, that the alleged exchange was contemporaneous and intended by the parties to be so. According, summary judgment on this issue must also be denied.

The final basis for MacLean's motion for summary judgment is that the transfers in question are protected from avoidance by the ordinary course of business exception of § 547(c)(2).[6] To prevail on this defense, the defendant must establish the

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[6]11 U.S.C. § 547(c)(2) provides that:
The trustee may not avoid ... a transfer ... to the extent that such transfer was—
(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
(C) made according to ordinary business terms.

following elements: (1) that the rental payment obligations pursuant to the lease agreements "were incurred by the debtor in the ordinary course of business or financial affairs of the debtor" and MacLean; (2) that the rental payments were made "in the ordinary course of business or financial affairs" of both parties; and (3) the rental payments were made "according to ordinary business terms." *See* 11 U.S.C. § 547(c)(2) and 5 COLLIER ON BANKRUPTCY ¶ 547.04[2][a] (15th ed. rev. 1999). The Sixth Circuit Court of Appeals has "repeatedly urged bankruptcy courts to consider several factors in reaching a decision on the ordinary course question. [Citation omitted.] These factors include the history of the parties' dealings with each other, timing, amount at issue, and the circumstances of the transaction. [Citation omitted.] Generally, the entire course of dealing is considered." *Brown v. Shell Canada Ltd. (In re Tenn. Chem. Co.)*, 112 F.3d 234, 237 (6th Cir. 1997).

Other than copies of documents comprising the parties' lease agreement, the only evidence offered on the issue of the ordinary course of business exception is the history since March 1993 of the rental payments made by the debtor to MacLean, attached to the affidavit of Mr. Benedict. This information alone, even though it indicates that the vast majority of the debtor's payments were late on an average of 11.6 days, is

insufficient to establish the requisite elements of § 547(c)(2). *See Frank v. Volvo Penta of the Americas, Inc. (In re Thompson Boat Co.)*, 1999 WL 133280 at *5 (6th Cir. Feb. 25, 1999)("[T]iming is only one consideration in the fact-specific analysis required [by 547(c)(2)]."). Moreover, paragraph (C) of § 547(c)(2), referred to as the "objective component" requires specific proof that the payments in question were not an aberration in the relevant industry. *See Luper v. Columbia Gas of Ohio, Inc. (In re Carled, Inc.),* 91 F.3d 811, 818 (6th Cir. 1996). No evidence concerning industry practice has been offered by MacLean.

For these reasons, MacLean's motion for summary judgment will be denied. An order to this effect will be entered contemporaneously with the filing of this memorandum opinion.

FILED: April 1, 1999

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE